

U.S. Department of Transportation
Federal Highway Administration

The Environmental Guidebook

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U.S. Department of Transportation
Federal Highway Administration

MEMORANDUM

SENT BY ELECTRONIC MAILSubject: **Information:** Tiering of the I-70 Project
Kansas City, Missouri to St. Louis

Date: June 18, 2001

From: **Original Signed By**
Frederick Skaer, Director
Office of NEPA FacilitationReply to HEPE
Attn of:To: Allen Masuda, Division Administrator
Jefferson City, Missouri

This is in response to your request for our thoughts on the acceptability and defensibility of relying on the first tier I-70 EIS for establishing logical termini and independent utility for purposes of analysis under the National Environmental Policy Act. Our short answer is that you have broad discretion in how you address these issues in the first and second tier analyses. You should be guided by the desirability of (1) explaining the nature of the first and second tier decision-making so that affected parties are fully aware of their opportunities to influence outcomes at the various decision points and, (2) structuring the decisions to avoid, to the extent possible, a decision on one section forcing an undesirable outcome on another section. Our rationale is explained below.

Our NEPA regulations provide that for major transportation actions the tiering of EISs may be appropriate (23 CFR 771.111 (g)). According to the regulations the first tier would focus on broad issues such as general location, mode choice, and area-wide air quality and land use implications of the major alternatives. The second tier would address site-specific details on project impacts, costs, and mitigation measures. As contemplated in our regulations and in the Council on Environmental Quality regulations, tiering is an option available to organize analysis and decision-making in complex circumstances in a way that takes into account the different geographic scope and timing for different decisions. The difference in scope and timing for the strategic decision of how to address long range needs on a 200 mile long section of I-70 between the major metropolitan areas in Missouri versus the specific location and design decisions for much shorter "projects" on I-70 certainly justifies a tiered approach. Because tiering is an option available to address complex situations, we have deliberately stayed away from prescriptive guidelines on how to apply tiering, so that each tiered process can be custom designed to the specific situation. (The FHWA Technical Advisory 6640.8A, Guidance for Preparing and Processing Environmental and Section 4(f) Documents, does not even mention tiering.) You therefore have considerable latitude in the specific tiering approach you utilize to implement the NEPA policy mandate of informed decision-making.

In exercising your discretion in designing the tiering process, we call your attention to the discussion in the preamble to our NEPA regulation (52 FR 32648; August 28, 1987). The preamble discusses the possibility of using an environmental assessment for second tier actions where no new significant impacts are expected. While not mentioned in the preamble, we could also foresee situations in which minor second tier actions qualified as categorical exclusions.

The same section of the regulation that addresses tiering also contains a provision relating to the geographic scope of actions evaluated in environmental impact statements (EIS) and findings of no significant impact (FONSI) (23 CFR 771.111(f)). This provision specifies a three part test. The actions shall (1) connect logical termini and be of sufficient length to address environmental matters on a broad scope, (2) have independent utility or independent significance, and (3) not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

Because this three-part test was established with the traditional non-tiered approach to NEPA in mind, we would like to comment on how it should be applied in a tiering situation. As a general rule, we believe that the first part of the test should apply only to the first tier of analysis, i.e. the analysis of sections of sufficient length to address environmental matters on a broad scope is the legitimate purview of the first tier of analysis and decision-making.

The second part of the test should be met for both first tier and second tier evaluations since it would not be reasonable to make either strategic decisions or to grant Federal location/design approvals relating to transportation improvements that were not usable and a reasonable public expenditure by themselves. The third part of the test is perhaps the most challenging: we address it below.

The heart of the test's third part is focused on avoiding undesirable outcomes on other reasonably foreseeable transportation improvements, rather than simply preserving the ability to consider alternatives in the abstract. With that in mind, we recommend that you pay specific attention in the first tier of analysis to structuring the decision-making so that the first tier strategic choices made concerning an improvement strategy for I-70 in its entirety not restrict the second tier location and design decisions to alternatives which have highly undesirable consequences, such as unusually severe impacts to communities or the natural environment that might have been avoided with a different first tier strategy.

As you have pointed out, one of the critical first tier tasks is to establish the subsections for second tier analysis. The approach proposed is to present initial thoughts in the first tier DEIS and to solicit comments on appropriate subsections. While maintaining this level of flexibility and openness is admirable and allowable, we suggest that you be somewhat more definite by using the first tier DEIS to identify proposed subsections (rather than initial thoughts) for the second tier analysis. You can maintain flexibility by communicating that the subsections are subject to refinement based on comments received.

The criteria used for establishing subsections should take into account both the purpose and need for the subsection projects, and avoiding "pointing a loaded gun" at an important resource(s) beyond the subsection. For example, subsections being improved primarily because of deteriorated pavement or bridge conditions need not use termini with major changes in traffic volume because the underlying need for the improvement is to address the deteriorated physical condition, not to address the growth in traffic volumes. The same would apply to subsections that are planned for improvement because of localized safety problems. Where the major rationale for improvement concerns congestion and delay, we would envision that the subsections would relate to logical break points in predicted traffic volumes so that the problem is not merely moved to the next section of the highway. To be a logical break point, traffic volumes need not change abruptly; in some cases they would dissipate over a series of interchanges to a point that represented a reasonable end point for a project. Your approach to subdividing the corridor into urban subsections in Columbia, Kansas City, and St. Louis and in intermediate rural subsections is consistent with our thinking. You may even see a benefit to having even smaller tier 2 subsections to address more immediate condition or safety problems.

The tier 1 analysis will give considerable insight into environmental consequences of tier 2 actions. Nevertheless, it is unlikely to provide a detailed understanding of the impacts to many of the resources encountered during the tier 2 analysis. It is therefore important to attempt to locate subsection termini in a way that takes into account what is known from the first tier of analysis but also provides a framework for flexible decision-making at the second tier. Therefore, we suggest that each of the second tier analyses look beyond the subsection termini to adjacent subsections for which second tier analyses have not yet been undertaken to ensure that one project doesn't point the "loaded gun" at resources associated with the adjacent project. Recent discussions with the Virginia Division indicate that they are drafting an approach to do just that for similar improvements along the full length of I-81. (In Virginia's case they used a feasibility study rather than a formal NEPA document for the tier 1 analysis, but the difference does not appear to be important to the issues before us). We will ensure that you receive a copy of their approach.

Tiering is by its very nature a complex undertaking. We commend you for taking a lead to look at long-range transportation needs for I-70 from a statewide perspective and thinking about improvements and consequences in a broad based examination. Because you have so much flexibility in customizing the tiering approach to your specific situation, it is critical that you carefully communicate your decision-making process to affected parties. We are available as a sounding board to assist you in this communication. We recommend that you also engage cooperating agencies and others to ensure that your communications are received as intended. One useful mechanism is to employ an editor who has been at arms length from the process to refine the message of the first tier DEIS.

In preparing the above analysis we consulted with Ron Moses of the Chief Counsel's office. If you have any questions about these comments, please contact Lee Dong at 202-366-2054 or Lamar Smith, NEPA Oversight Team Leader, at 202-366-8994.